UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

AVANTI HEALTH SYSTEM, LLC;
CHHP HOLDINGS II, LLC; AND
CHHP MANAGEMENT, LLC

and **Cases 21-CA-39264**
21-CA-39268

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE,
NATIONAL NURSES UNITED, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Submitted by:

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Table of Cases **Page(s)**

NLRB Cases

Federal Cases

Table of Contents **Page**

I. INTRODUCTION AND POCEDURAL HISTORY

Before March 2010, Community Hospital of Huntington Park was owned by Karykeion Inc., and the registered nurses were represented by California Nurses Association. Around March 2010, Avanti Health System created CHHP Holdings to buy and hold the assets of Community Hospital and created CHHP Management, to manage Community Hospital. After taking over ownership and control of the hospital, a majority of the RNs hired were members of the CNA bargaining unit under the predecessor. Despite the foregoing and the Union's request for recognition and bargaining, Respondents refused. A consolidated complaint issued and the Honorable Gerald Wacknov presided over a 4-day hearing from March 14 to March 17, 2011.

In 2011, the Regional Director of Region 21 filed for temporary injunctive relief under Section 10(j) of the Act and on March 28, 2011, the federal district court granted temporary injunctive relief, ordering Respondents to, inter alia, recognize and bargain with the California Nurses Association. Respondents have appealed the district court order. On June 14, 2011, the ALJ issued his Decision and Order, finding that Respondents are a successor and a single employer and are obligated to recognize and bargain with CNA.

II. UNCHALLENGED FINDINGS AND FACTS THAT RESPONDENTS HAVE WAIVED

Pursuant to Section 102.46(b) of the National Labor Relations Board's Rules and Regulations, any expectations to a ruling, finding, conclusion, or recommendation not specifically made is deemed waived. Respondents have failed to except to the following findings of facts and conclusions of law, which are summarized below. Thus, the Board should affirm them:

1. The ALJ's finding that various investors of Respondent Avanti established Respondent CHHP Holdings, which in turned established Respondent CHHP Management. (ALJD 3:11-13)[1]
2. The ALJ's finding that Respondent Avanti was the guarantor of loans which enabled Respondent Holdings to purchase Community Hospital. (ALJD 3:14-15)
3. The ALJ's finding that Respondent Avanti's website identifies it as Community Hospital's owner. (ALJD 3:21-32)
4. The ALJ's finding that Respondents provided no evidence to explain the inconsistency in Avanti's claim of a tangential relationship and its website claim of ownership. (ALJD 34-36)
5. The ALJ's finding that Respondent Avanti owns East L.A. Doctors Hospital with no management entity; that Avanti directed East L.A.'s management team to run Community Hospital and they have since been in charge of the daily operations; and the same work rules, policies, wages, and benefits Avanti had in place at East L.A. were mirrored and applied to the Community Hospital employees. (ALJD 3:38-55; 4:5-13)
6. The ALJ's finding that Steve Lopez testified in his Board affidavit, in his sworn declaration submitted to the District Court and at the hearing that as of the March 26 take over, Community Hospital had adequate staffing to run the hospital. (ALJD 5:21, fn 3) Moreover, in early April, the hospital passed the health department's audit review of its staffing levels. (ALJD 5:22-27)
7. The ALJ's finding that as of March 26, there were 47 non-supervisory RNs and 30 had been employed by the predecessor, a majority of 63.8 percent. (ALJD 5:28-31)
8. The ALJ's finding regarding the content of the per diem agreements, the contractual benefits applicable to per diem employees, the obligations of per diem employees, and the conclusion that per diem RNs are properly included in the CNA unit. (ALJD 6:25-45)
9. The ALJ's finding that neither Ki Kim nor Lillian Pascua are listed as clinical supervisors as of March 25 – the day before Respondents bought the hospital. (ALJD 9:37-40)

[1] All citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). The All citations to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page number(s). all citations to Respondents' Exceptions will be referred to as "RE" followed by the appropriate number and citation to Respondents Exceptions Brief will be referred to as "RB" followed by the appropriate page number(s). General Counsel's exhibits will be referred to as "GCX" followed by the appropriate number(s). Respondents' exhibits will be referred to as "RX" followed by the appropriate number(s). Charging Party Union's exhibits will be referred to as "CPX" followed by the appropriate page number(s).

III. FACTS

A. Predecessor – Karykeion, Inc.

1. Collective-Bargaining Agreement

Prior to March 2010,[2] Karykeion, Inc. ("Karykeion") owned and operated the Community Hospital of Huntington Park ("Community Hospital" or "hospital"), an acute care hospital. Karykeion had collective-bargaining agreements with California Nurses Association ("CNA" or "the Union"). Karykeion's collective-bargaining agreement ("CBA") with CNA had a term of January 1, 2007, to June 30, 2010. (ALJD 4:30-44) (CPX 1)[3] The bargaining unit represented by CNA is described in Article 1 – Recognition of the CBA ("CNA bargaining unit" or "RN bargaining unit") as:

> Included: All full-time, part-time, and per diem Registered Nurses, including those who serve as relief charge nurses.
>
> Excluded: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses.

Certified nursing assistance, licensed vocation nurses ("LVN"), social workers, dieticians, pharmacists and all nursing supervisors, including clinical supervisors, were not included in the RN bargaining unit (Tr. 46-48)

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[2] Unless otherwise stated all dates are in the year 2010.

[3] The CBA reads that it's an agreement with Community and Mission Hospital of Huntington Park. In 2008, Karykeion closed down Mission Hospital, which was primarily a pediatric and obstetrician hospital. (Tr. 405-406)

2. *Karykeion's Bankruptcy and Respondent Avanti's Negotiations to Buy the Hospital*

In September 2008, Karykeion filed for Chapter 11 bankruptcy. (Tr. 33) Daniel Ansel ("Ansel"), Karykeion's chief reorganization officers, interim chief executive officer, and interim chief financial officer,[4] testified at the underlying hearing. In 2009, Avanti Health System ("Respondent Avanti") entered into negotiations with Karykeion to purchase, own, and operate Community Hospital. (ALJD 3:9-11) (Tr. 240) On January 12, Respondent Avanti and Karykeion executed a Memorandum of Understanding ("MOU"), which outlined the terms under which Respondent Avanti, or its designees, would purchase Community Hospital.[5] (GCX 5) As agreed to in the MOU, on February 8, Respondent Avanti made a bridge loan to Karykeion in the amount of $1 million aimed at keeping Karykeion afloat during the bankruptcy proceeding. (GCX 17 and 18)

B. Respondents Interview Employees and Buy Community Hospital

On about February 22, Karykeion notified its employees via memorandum that Respondent Avanti would be conducting on-site interviews in February and conducting a job fair from March 1 to 5, interviewing applicants to work at the hospital. (Tr. 66-67) (GCX 3)

Respondent Avanti also owns East Los Angeles Doctors Hospital ("East L.A. Doctors"), where it employed Araceli Lonergan ("Lonergan"), working as the chief executive officer ("CEO"). Once Respondent Avanti began negotiating to purchase Community Hospital, Stephen

[4] In addition to overseeing the bankruptcy proceedings, Ansel was responsible for the day-to-day operation of the hospital, all the financial affairs, and all department mangers reported to him. (Tr. 34)

[5] The MOU outlined which assets were included and excluded from the purchase; provided for a bridge loan for $1 million to kept the hospital solvent and which would serve as an advance against the purchase of the hospital; provided for a $5.5 million purchase price, reduced by any unpaid principal and interest on the bridge loan and reduced by $300,000 in assumed employee liabilities. (GCX 5, page 3) The MOU identified the liabilities each party would retain and required that Respondent Avanti enter into a 'leaseback' agreement with Karykeion for the actual management of the hospital. (GCX 5, page 4)

Dixon, Respondent Avanti's CEO and co-owner, assigned Lonergan to head-up the interviewing and hiring of applicants. (ALJD 3:41-42) (Tr. 356-357, 372) Though CHHP Management, LLC ("Respondent Management") had not yet been established as a company in February, the flyer that was circulated, reads that Respondent CHHP Management, LLC was conduct the job fair. (GCX 4) Further, during the February onsite interviews and the March job fair, while representing Respondent Avanti, Lonergan and her management team distributed job applications, which applications identified Respondent Management as the forthcoming employer. (GCX 24)

On about March 15, Respondent Avanti's agents made the final hiring decisions. Ultimately, according to Respondent Avanti, its senior lender refused to fund the purchase and several of Respondent Avanti's owners created two companies: CHHP Holdings, LLC ("Respondent Holdings"), to buy the hospital and Respondent Management, to management the hospital's employees.[6] (ALJD 3:11-13)

On March 25, Karykeion and Respondent Holdings entered into an asset purchase agreement, with essentially the same terms that Respondent Avanti had negotiated in the MOU with Karykeion. Thus, the asset purchase agreement identified the purchase price as $4.5 million, which is a $1 million reduction for the bridge loan Respondent Avanti made to Karykeion. (GCX 12, page 15) The agreement also provides for the cancellation of the bridge loan balance in the amount of $250,000 and like the MOU, the asset purchase agreement includes the same $300,000 price reduction in assumed employee liabilities. (GCX 12, page 15-16) Also, like the MOU, the asset purchase agreement requires the establishment of a leaseback management agreement for the management of the hospital. Consistent with the terms of the

[6] On March 4, articles of incorporation were filed for Respondent Holdings and Respondent Management. (GCX 9-11)

MOU and the asset purchase agreement, on March 25, Respondent Management and Karykeion entered into an interim management agreement and a leaseback agreement to operate Community Hospital. (GCX 15 and 16, respectively)

C. Substantial and Representative Complement Reached as of March 26

On March 26, Respondents took over operation of the hospital with no hiatus or break in operations and since have continued operating it as an acute care hospital. (ALJD 4:5) (Tr. 156-157) Steve Lopez ("Lopez"), chief financial officer ("CFO") of Respondent Management, testified in his affidavit given to the Regional office during the investigation, in his declaration to the federal court in the Section 10(j) proceedings, and again at the unfair labor practice ("ULP") hearing that as of March 26, Community Hospital was fully staffed to run the hospital successfully. (ALJD 5:21-23, fn. 3) (RX 2, page 4) In fact, shortly after the hospital was purchased, on about April 2, the Department of Public Health ("DPH") executed an inspection audit of Community Hospital. Part of the audit included checking the hospital's staffing levels. Community Hospital passed the inspection, and DPH determined that the hospital had adequate staffing levels. (ALJD 5:24-26) (Tr. 158, 467-470)

Despite Lopez' repeated testimony, at the hearing, Respondents took the position that it did not have a substantial and representative complement until the first full payroll period, which was April 5 to April 18. (ALJD 6:47-50) (Tr. 585)

D. Respondents Reject the Union's Demand for Recognition and Bargaining

On March 6, CNA wrote to Respondent Avanti, demanding recognition and bargaining. (ALJD 4:46) (GCX 26) On March 27, Respondent Management replied, refusing to recognize

and bargain with the Union and stating that the Union did not represent a majority of its employees. (ALJD 4:50) (GCX 27)

E. Respondents' Claims that the Workforce was "Unstable" and "Chaotic" on March 26

At the hearing, Respondents took the position that it did not have a substantial and representative complement until the first full payroll period, which was April 5 to April 18. (Tr. 585) Respondents' witnesses testified that the hospital's operations were chaotic and unstable on March 26. Respondents cite a number of factors that lead to this purported chaos and instability:

First, Respondents claim that sometime before the March 26 take over, a union submitted a written notice to strike. Respondents did not produce the written strike notice at the hearing and conceded that no strike ever occurred. Respondents' witnesses could not even recall the name of the union that submitted the alleged strike notice. (Tr. 55, 75, 456, 502) There is no evidence that CNA ever submitted any notice to strike. (Tr. 544)

Second, Respondents assert that although employees accepted job offers many did not show up for work. None of Respondents' witnesses could identify a single nurse – certified nursing assistant, LVN, or RN – that accepted employment but failed to show up to work. (Tr. 447, 463, 503, 676)

Third, Respondents claim that it had to utilize "floaters" or "migrating" nurses from its East L.A. Doctors hospital and from registry agencies to shore up its employee-complement. However, none of these floaters appear on Respondents' payroll during the relevant period of time. (GCX 7 and 8) (RX 4) Moreover, these same floaters floated between the two hospitals under the predecessor and they were members of the CNA bargaining unit. (Tr.673-674) Regarding the registry use, Respondents' summary chart of registry hours does not segregate the

use of RNs versus LVNs nor does it show how frequently RNs were used over LVNs. Carmelo James ("James'), chief nursing officer ("CNO") testified about the number or registry hours but admitted that he never secured registry nurses. That was the responsibility of the nursing house supervisor, who would also determine whether to secure a LVN or a RN and no house supervisors testified at the hearing. (Tr. 658-659)

Finally, Respondents argued that when it took over it planned to expand its RN workforce. However, Lonergan testified that when it came to hiring employees, Respondents had no actual plan, but only a "just-in-case plan" that would accommodate an increase in patient numbers. (Tr. 490) In fact, both Lonergan and Lopez testified that the one thing about hospitals is that there is always hiring. (Tr. 462, 474)

F. Calculations of Majority Status

1. Karykeion's Payroll Record Identifying CNA Bargaining Unit Employees

Entered into the record as GCX 2 is an employee register identifying all Karykeion's employees on its payroll as of March 25. The employee register identifies employees by name, title, department, employment status (full-time, part-time, or per diem[7]), and to which, if any, bargaining unit each employee belonged. The column entitled "StdCNAUN#" indicates those employees who were members of the CNA bargaining unit. (Tr. 39) Ansel, who personally generated the employee register, testified that if any number other than zero appears in the CNA bargaining unit column, it indicates that that respective employee was a member of the CNA bargaining unit.[8] (Tr. 39-40)

[7] As identified on the employee register in the FT/PT column: "P" stands for part-time; "F" stands for full-time; and "D" stands for per diem. (Tr. 39)

[8] With one exception, the number in the CNA bargaining unit is "1.01". For employee Aurelia Del Rosario, the number is 35.84. Ansel could not explain the anomaly but assured that if any number other than 0 appeared in the

In February, Dinorah Williams ("Williams"), CNA's , labor representative, requested that Karykeion supply the Union with a list of CNA bargaining unit employees, complete with their contact information, and their employment status. Karykeion, through Charlotte Sanders, who Ansel confirmed was Karykeion's human resources supervisor at the time, supplied the Union with a list of bargaining unit employees. (Tr. 84, 393) (GCX 28) The names on the list of CNA bargaining unit members identified in GCX 28 ("CNA membership list") are identical to those identified in GCX 2 ("Karykeion's payroll").

2. Respondents' Payroll Records

During the investigation of the underlying ULP charges, Respondents supplied positions statements and documents regarding the RNs employed and working at Community Hospital from March 26, to May 16. Respondents presented four payroll abstracts/lists: one for the period from March 26 to April 4; one for the period April 5 to April 18; one for the period April 19 to May 5; and one for the period May 3 to May 16.[9] (GCX 7 and 8) Respondents identified the payroll lists as containing "all registered nurses in the employ of CHHP" during the payroll period indicated and all RNs who performed services for Community Hospital. For the last three payroll abstracts, Respondents wrote "HP" (standing for Huntington Park; that is, Community Hospital of Huntington Park) next to the name of those RNs who had Respondents believed worked for predecessor Karykeion in the CNA bargaining unit. (GCX 7)

CNA column that employee was in the CNA unit. Further, employee Aurelia Del Rosario appears on the CNA membership list (GCX 28) and Juliet Miranda, Karykeion's director of nursing, testified that the employee was in the CNA unit. (Tr. 222)

[9] Each payroll is for a 2-week pay period.

3. Majority Status

There are 47 non-supervisory RNs listed on Respondents' March 26-April 4 payroll abstract.[10] (GCX 8) Comparing Respondents' payroll abstract (GCX 8) with Karykeion's payroll record (GCX 2), shows that of the 47 non-supervisory RNs, the following 30 were employed with Karykeion in the CNA bargaining unit, which is a representative majority of 63.8%:[11] (ALJD 5:28-31)

March 26 to April 4 Payroll Record

Last Name	First Name	Page on which the name appears on Karykeion's payroll records
1. Palad	Farrah	7
2. Gumangan	Kristine	7
3. Li	Maria	7
4. Penaflorida	Mark	6
5. Ponce	Cherylynn	7
6. Ricasata	Anna	7
7. Villacruces	Susan	8
8. Betito	Thelma	8
9. Del Rosario	Jocelyn	8
10. Garces	Haydee Trinity	8
11. Napdo	Liza	8
12. Pascua	Lilian	8
13. Pastores	Alfonso	8
14. Talamor	Armi	8
15. Lee	In-Sook	9
16. Enriquez	Albert	9
17. Lazaro	Isabel	9
18. Guinto	Rodelyn	7

[10] There are 50 names on the payroll abstract but three are nursing supervisors: Frenie Evidente; Luxmi Sales; and Zenaida Savellano. Supervisors and managers are excluded from the CNA bargaining unit and Respondents stated at the hearing that the foregoing nursing supervisors should be excluded from the CNA bargaining unit. (Tr. 641-642) Respondents have made no arguments—at the ULP hearing or in its exceptions brief—that these supervisors should be included in the bargaining unit.

[11] The employees are listed in the order that they appear on Respondents' payroll abstract. Each named RN also appears on the CNA membership list entered into the record as GCX 28.

19. Chavez	Melissa	5
20. Gonzalez	Ofelia	5
21. Pangilinan	Amabel	5
22. Cereceres	Juana	9
23. Rosales	Mildred	9
24. San Felipe	Adelina	9
25. Uy	Concepcion	9
26. Murga	Antonio	9
27. Zaremba	Nelia	9
28. Bauer	Colleen	9
29. Castillo	Marcial	9
30. Kim	Ki	9

On Respondents' April 5 to April 18 payroll abstract there are 54 non-supervisory RNs listed.[12] Comparing Respondents' payroll abstract (GCX 8) with Karykeion's payroll record (GCX 2), shows that of the 54 non-supervisory RNs, 33 were employed with the predecessor in the CNA bargaining unit, which is a representative majority 61.1 %:[13]

April 5 to April 18 Payroll Record

Last Name	First Name	Page on which the Name Appears on Karykeion's payroll records
1. Palad	Farrah	7
2. Gumangan	Kristine	7
3. Li	Maria	7
4. Penaflorida	Mark	6
5. Ponce	Cherylynn	7
6. Ricasata	Anna	7
7. Baldovino	Edna	6
8. Villacruces	Susan	8
9. Betito	Thelma	8
10. Del Rosario	Jocelyn	8
11. Garces	Haydee Trinity	8
12. Encarnacion	Rene	8
13. Napdo	Liza	8
14. Pascua	Lilian	8
15. Pastores	Alfonso	8

[12] The ALJD correctly notes that there are 59 names on the list (ALJD 10:23-24); however, one is identified as Liliana Ocampo, ICU manager; and, as stated in footnote 10, four are nursing supervisors: Frenie Evidente; Luxmi Sales; Zenaida Savellano; and Eleanor Tangonan, which classifications are supervisory.

[13] Each named RN also appears on the CNA membership list entered into the record as GCX 28.

16. Runas	Lydia	8
17. Talamor	Armi	8
18. Lee	In-Sook	9
19. Enriquez	Albert	9
20. Lazaro	Isabel	9
21. Guinto	Rodelyn	7
22. Gonzalez	Ofelia	5
23. Pangilinan	Amabel	5
24. Cereceres	Juana	9
25. San Felipe	Adelina	9
26. Uy	Concepcion	9
27. Yu	Edna	9
28. Macaspac	Luz	9
29. Murga	Antonio	9
30. Zaremba	Nelia	9
31. Bauer	Colleen	9
32. Castillo	Marcial	9
33. Kim	Ki	9

a. Respondents' List of 65 RNs

At the hearing, Respondents claimed that its own March 26 – April 4 payroll abstract, listing 47 non-supervisory RNs, is not what Respondent had represented it to be (the "RNs who performed services at" Community Hospital). (Tr. 463-464) Instead, Respondents asserted that as of March 26, it really had 65 RNs hired and scheduled to work at the hospital. (Tr. 467) Respondents presented no documents that show it hired 65 RNs, though Lonergan testified that Respondents had a Personnel Action form, which document would show accepted employment offers. (Tr. 512-513)

According to Lopez, on March 26, he and Richard Kopenhefer ("Kopenhefer"), Respondents' counsel, met to determine whether CNA represented a majority of RNs. Lopez and Kopenhefer calculated the number of employees who would belong to the CNA bargaining unit. (Tr. 553) On a spreadsheet listing the names of all employees who accepted employment offers, separated by department, Kopenhefer and Lopez identified which employees would fall under the CNA bargaining and which of the hired employees worked for Karykeion, writing

"HP" (again for Huntington Park) next to their names. (Tr. 554) (RX 2, page 7-8) When calculating which RNs would be in CNA unit, Lopez testified that he did not include those hired by Respondents as supervisors or those who served as supervisors for Karykeion. (Tr. 568)

i. a majority of the 65 RNs were members of the CNA bargaining unit

As it relates to Respondents' spreadsheet of 65 RNs who were supposedly hired as of March 26. (RX 2, Exhibit A), of the 65 listed, 36 were employed with the predecessor in the CNA bargaining unit, which is still a representative majority of 55.3%:

RX 2, Exhibit A Spreadsheet[14]

Last Name	First Name	Page on which the name appears on Karykeion's payroll records
EMERGENCY DEPT		
1. Encarnacion	Rene	8
2. Libunao	Rosie	8
3. Betito	Thelma	8
4. Del Rosario	Jocelyn	8
5. Garces	Haydee	8
6. Napdo	Liza	8
7. Pascua	Lilian	8
8. Pastores	Alfonso	8
9. Runas	Lydia	8
10. Talamor	Armi	8
11. Villacrusis	Susana	8
ICU		
12. Lazaro	Isabel	9
13. Enriquez	Albert	9
14. Lee	In-Sook	9
MEDICAL-SURGICAL		
15. Espino	Josephine	5
16. Chavez	Melissa	5
17. Gonzalez	Ofelia	5
18. Palad	Farrah	7
19. Pangilnan	Amabel	5

[14] The names are listed by department and as they appear on Respondents' spreadsheet. Each name also appears on the CNA membership list entered into the record as GCX 28.

PEDIATRICS		
20. Soriano	Maricel	9
21. Cereceres	Juana	9
22. Rosales	Mildred	9
23. San Felipe	Adelina	9
24. Uy	Concepcion	9
SURGERY		
25. Bauer	Colleen	9
26. Castillo	Marcial	9
27. Murga	Antonio	9
28. Zaremba	Nelia Del Rosario	9
TELEMETRY		
29. Guinto	Rodelyn	7
30. Gumangan	Ma Kristine	7
31. Lamban	Rowena	6
32. Li	Maria Corazon	7
33. Mendoza	Jocelyn	5
34. Penaflorida	Mark Wayne	6
35. Ponce	Cherylynn	7
36. Ricasata	Anna	7

4. Respondents' Claim that a Variety of Non-RN Job Classifications Should be Included in the CNA Unit

a. Jeremias Azuela-Performance Improvement and Risk Management

Respondents had James, CNO, to testify about the performance improvement and risk management ("PIRM") position, but he conceded that the position does not report to him, instead the PIRM reports to Hector Hernandez, chief operating officer ("COO"), who was not called to testify. (ALJD 8:26-27) (Tr. 634) The PIRM employee, Jeremias Azuela ("Azuela"), was hired in this position with Respondents and had worked in the same position with Karykeion and he was not included in the CNA bargaining unit. (ALJD 8:27-29) (Tr. 634) (GCX 2, page 4). James claimed that Azuela is a RN but with Karykeion his title was "QA coordinator" and with Respondents it is "PI/RM coordinator." (GCX 2) (RX 4) Neither of these titles reveals that he is a RN and Respondents presented no evidence that Azuela is a RN or performed any RN duties. (ALJD 8:42-44)

According to James, the PIRM employee is responsible for looking at ways to improve the hospital. To accomplish this, the PIRM employee gathers data and analyzes it with a team of employees to develop smoother hospital operation and compliance. (ALJD 8:31-40) (Tr. 634) Respondents presented no detailed evidence of interaction with RNs or evidence of any changed duties or responsibilities from when Karykeion operated hospital.

b. Susanne Zemer-RN Educator

According to Respondents its RN educator, Suzanne Zemer ("Zemer"), educates all hospital staff – not just nurses – on compliance with hospital standards and guidelines. (Tr. 635) Respondents use Zemer as well as various nursing schools to train and educate all nurses on their required and voluntary certificates. (ALJD 8:46-47, 9:1-8) (Tr. 688-689) Zemer was not called to testify about her duties and interaction with RNs. Respondents produced no documents that it ever hired anyone named Susanne Zemer. None of the documents entered into the record by Respondents or by General Counsel show Zemer's name. (ALJD 9:10-11)

c. Barbara Edmonds - Infection Control Employee

According to Respondents, the infection control employee, Barbara Edmonds ("Edmonds"), is responsible for handling the hospital's infection control plan to counter any viruses that may develop in the hospital. (ALJD 9:16-19) (Tr. 636) All hospitals are required to have and maintain an infection control plan and employee and there is no requirement that the person be a RN. (Tr. 663-664) Thus, Karykeion had the same position, which position was not a part of the CNA bargaining unit. (Tr. 637) There is no evidence that Edmonds is a RN. Respondents presented no evidence of any changed duties or responsibilities with the infection

control position from when Karykeion operated the hospital. Next, Edmonds was not called to testify about her duties and interaction with RNs. Edmonds is a contract or per diem worker and provides the same services to both Community Hospital and East L.A. Doctors. (Tr. 636)

d. Magdalena Vargas and Arturo Ponce - Utilization Review Managers

Utilization review case managers are responsible for reviewing patients' charts and determining whether there continued hospital stay is warranted based on their medical condition. Utilization review case managers work with social workers, LVNs, RNs , and doctors to determine patient needs and the necessity of certain medical treatments. (Tr. 44, 630, 633-634) The utilization review case manager position is a common hospital position and Karykeion had them as well. Karykeion's utilization review mangers were not RNs. (Tr. 223) Respondents presented no evidence of any changed duties or responsibilities of utilization review managers from when Karykeion operated the hospital. Respondents argued that it hired two RNs – Magdalena "Maggie" Vargas ("Vargas") and Arturo Ponce ("Ponce") – as utilization review case managers. (Tr. 631, 634) James testified that he hired these two utilization review managers because they could assess patients' needs better than LVNs and could better communicate with doctors. (Tr. 631-632) James did not testify that having a RN license is a requirement of the utilization review positions. (ALJD 8:11-13) Respondents did not present the RN license of either Vargas or Ponce. Respondents did not produce either utilization review managers for testimony about their job functions, duties, and community of interest with RNs.

Respondents produced no documents showing that Vargas was ever hired. James contended that Vargas started working in April, but none of the payroll documents or

spreadsheets produced by Respondents or by General Counsel show Vargas' name. (ALJD 8:6-8) (GCX 7 and 8) (RX 2, Exhibit A and RX 4, 5) (Tr. 633)

As it relates to Ponce, his name first appears on the May 3 to May 16 payroll abstract. (GCX 7) Yet again, though Respondents claim that on March 26 it determined which employees would fall into the CNA bargaining unit. Respondents' spreadsheet on which it counted those employees included in the CNA unit shows that "non-U" is written next to two of the four utilization review managers, and "2(11)" is written next to a third name. At the bottom of the spreadsheet page identifying the utilization review department employees, Respondents' agents wrote "CNA 0/0", meaning that none of the utilization review managers would be considered CNA bargaining unit members. (RX 2, Exhibit A, see page 22) Notably neither Vargas' nor Ponce' names appear on the spreadsheet.

4. Respondents' Claim That Former Per Diem RNs Should be Excluded

As stated above, the CNA bargaining unit includes per diem RNs. Respondents argue that per diem RNs employed with Karykeion should not be included in any appropriate CNA bargaining unit. According to Respondents, its per diem RN procedure is different from Karykeion's system. Under Respondents' system per diem RNs must commit to one weekend a month or would be subject to progressively disciplined. (Tr. 650) James, who never worked for Karykeion, speculated that Karykeion's per diem system required only that per diem RNs be available for work. Williams, CNA's agent who negotiated the CBA with Karykeion and who is actually familiar with the per diem status, testified that she negotiated the per diem agreement contract language to which employees had to sign in order to be per diem RNs. (ALJD 6:31-33) (Tr. 745-746) Williams testified that each pay period per diem RNs had to submit their available

work days and if they failed to do so, they would be subject to disciplinary action. (ALJD 6:39-41) (Tr. 748-749)

Respondents produced no documentary evidence describing its per diem RN system. The record does, however, have documentary evidence of the per diem system as it existed under Karykeion, which shows that per diem RNs had to be available to work one day a weekend one weekend a month, had to submit their days of availability prior to each work schedule being posted, and had to agree to work specific holidays. Failure to abide by the foregoing requirements could result in discipline. (RX 21-26)

G. Single and/or Joint Employer Status

1. *Owners and Officers*

Each Respondent is owned by individual member-owners and two corporations. Of course as member-owners, each shares in company profits and losses. (GCX 13, page 41 and Exhibit A; GCX 14, page 42 and Exhibit A; GCX 23, Exhibit A) The following five individuals are shared owners of each Respondent: Poe Corn ("Corn"), Joel Freedman ("Freedman"), James MacPherson ("MacPherson"), Nicholas Orzano ("Orzano"), and Stephen Dixon ("Dixon"). (Tr. 244-245) (GCX 13, 14, 23) Respondents Holdings and Management have two additional owners: David Benjamin ("Benjamin") and Lonergan.[15] (GCX 13 and 14) Each Respondent has two corporate owners: Hollister Health Holdings and Scissorhands, LLC. (Tr. 244-246) (GCX 13, 14, 23) Individual owner Corn is also a managing member of Scissorhands and Mark Bell ("Bell") is a managing member of Hollister Health Holdings. (Tr. 246-247) The above-named owners also served as officers of Respondents Avanti and Management. According to Seema Kamal Stewart ("Stewart"), Respondents', Respondent Holdings has no officers. (Tr.

[15] Neither Benjamin nor Lonergan are member-owners of Respondent Avanti.

337) The Board of Managers for Respondent Avanti and of Respondent Management is comprised of Corn, Bell and MacPherson.[16] (Tr. 241, 243, 337) (GCX 10(c) and 23) During all times relevant, Dixon simultaneously served as both the CEO of Respondent Avanti and the chairman of Respondent Management. (Tr. 242, 337) (GCX 10(c)) Benjamin simultaneously served as the CFO of Respondent Avanti and the vice president of finance for Respondent Management. (Tr. 242-243) (GCX 10(c))

The above-named owners and officers also signed key business documents for Respondents. MacPherson also filed and executed the incorporation documents of Respondents Holdings and Management, signing as the manager of each company. (GCX 9(b) and 10(b)) The asset purchase agreement provides the terms under which Respondent Holdings purchased the assets of Karykeion, (i.e., the equipment, machines, and fixtures within Community Hospital). (Tr. 251) Macpherson signed the asset purchase agreement for Respondent Holdings as a managing member. (GCX 12, page 38) The interim management agreement, between Karykeion and Respondent Management, sets forth the terms under which Respondent Management will management the hospital and its employees. MacPherson signed the interim management on behalf of Respondent Management as a managing member. (Tr. 253, 257) (GCX 15) Finally, all the above-named owners signed the operating agreements for each Respondent. (GCX 13, 14, and 23)

2. *Interrelation of Business Operations*

Respondent Avanti was a guarantor on two separate financial instruments to Respondents Holdings and Management, totaling $7 million, which related directly to the purchase and operation of Community Hospital. (GCX 22) (CPX 5) One was a $2 million loan made on

[16] Corn has been the CEO of Respondent Avanti since about September 2010. (Tr. 242)

March 22 during Karykeion's bankruptcy proceedings. Prior to the sale, the bankruptcy court required that the bidding company have the financial capacity to purchase the hospital at an auction, so Respondent Management obtained a $2 million loan, to which Respondent Avanti was the guarantor.[17] The actual guarantor agreement shows that Respondent Avanti was the guarantor in a $2 million loan received by Respondent Management for the purchase and operation of Community Hospital. (GCX 22)

Respondent Avanti was also a guarantor on a $5 million-line of credit extended to Respondents Holdings and Management for the acquisition and operation of Community Hospital. (Tr. 338-340) (CPX 5)

Respondent Avanti's business address is 1111 North Sepulveda Boulevard, Suite 230, Manhattan Beach. (Tr. 247) According to incorporation documents and the operating agreements both Respondents Holdings and Management have the same business address. (GCX 9(A), (B) and GCX 10(A), (B), GCX 13 and 14)

According to Respondent Avanti's website, avantihospitals.com, it "owns and operates acute care hospitals." (ALJD 3:24) (Tr. 249) (GCX 19) Under the "News and Events" tab on the website is an article entitled "Acquisition of Community Hospital of Huntington Park" dated March 25, 2010, which reads: Avanti added its third hospital to its system today, Community Hospital of Huntington Park ("CHHP"). ...Purchased from Karykeion, Inc., through a 363 Bankruptcy Auction, Avanti hopes to quickly revitalize the facility ...CHHP will be managed by

[17] Stewart provided a declaration to the bankruptcy court certifying that Respondent Avanti would serve as a guarantor on the loan in Respondent Holdings' bid to acquire Community Hospital. (Tr. 268) In the same declaration, Stewart testified that Respondent Avanti was "an affiliate" of Respondent Holdings. (Tr. 268) Before March Stewart was only Respondent Avanti's general counsel. In March she was appointed to also serve as Respondent Management's general counsel. Stewart testified that she advises the human resources department of Community Hospital when they consult her for help with documents, employee discharges and leaves of absences, and severance agreements. (Tr. 314) Stewart is also a member of Community Hospital's governing board that oversees all the hospital operations, including its policies and procedures relating to patient care. (Tr. 378-379, 383-384)

Araceli Lonergan, CEO of East Los Angeles Doctors Hospital, with assistance provided by the operating team of Avanti. (GCX 20)

Moreover, under the "Our Hospitals" tab it reads that "Avanti and its affiliates currently own and operate three acute care hospitals: East Los Angeles Doctors Hospital, Memorial Hospital of Gardena, and our sister hospital, Community Hospital of Huntington Park..." (ALJD 3:29-32) (GCX 21)

3. *Common Management and Control Over Labor Relations and Employee Policies*

Before March, Lonergan, Lopez, Hernandez, and James all worked at the Respondent Avanti-owned East L.A. Doctors hospital.

Lonergan testified that she takes her instruction and direction of work directly from Respondent Avanti's officers. Lonergan, in turn, directs Lopez, James, and Hernandez. Before the March purchase, Lonergan was told that she would be in charge of the interviewing and hiring of Community Hospital. (Tr. 361) Lonergan and her management team, which she identified as Lopez, Hernandez, and James, were among the managers that made all the hiring decisions for Community Hospital. (ALJD 3:52-54) The employment applications, initially circulated in February, bear Respondent Management's name as the employer. (GCX 24) (Tr. 365) Even after Respondent Avanti was supposedly precluded from purchasing Community Hospital, Lonergan and her management team continued to handle the interviewing and hiring process.

Unlike Community Hospital, there is no management company managing East L.A. Doctors so Respondent Avanti directly manages that East L.A. Doctors. (ALJD 3:40-41) (Tr. 352) When Respondents purchased Community Hospital, Lopez and Lonergan testified that the

same employment policies, procedures and rules, including sick leave and vacation leave in place at East L.A. Doctors were implemented at and applied to the Community Hospital employees. (ALJD 3:55) (Tr. 150, 153, 362, 691) The same pay scale range utilized at Respondent Avanti-owned East L.A. Doctors was implemented at Community Hospital. (Tr. 152, 426) The same employee-benefits, including health and dental benefits in place at East L.A. Doctors were instituted at Community Hospital. (ALJD 3:39-55)

Lonergan, Lopez, Hernandez, and James are responsible for the day-to-day operation of and divide their time between Community Hospital and East L.A. Doctors. (ALJD 3:44) (Tr. 154, 361-362) The same management team and many department heads, such as lab, radiology, materials management, dietary, and housekeeping, are used at both hospitals. (Tr. 153)

If employees whose "home" hospital (i.e., the hospital where the employee normally performs work) was East L.A. Doctors but they provided services for Community Hospital, they would be pay in a single paycheck by East L.A. Doctors. (Tr. 521-522) Lopez testified that the Respondents would merely allocate the work hours to the relevant hospital, describing this process as akin to simply assigning the work hours to a different department number. (Tr. 575)

IV. ARGUMENTS AND CITATIONS OF AUTHOURITY

A. The ALJ Correctly Found that Respondents Operate the Hospital as a Single Employer

To determine whether more than one enterprise is a single employer, four primary factors are considered: (1) control of labor relations; (2) common management; (3) interrelation of operations; and (4) common ownership. Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965); Proctor Express, Inc., 322 NLRB 281, 289-90 (1996); NLRB v. Browning, 691 F2d 1117 (3rd

Cir. 1982); Hydrolines, Inc., 305 NLRB 416, 417 (1991). While presence of all four factors is not necessary, centralized control of labor relations is the "single most important factor in the analysis." Dow Chemical Co., 326 NLRB 288 (1998) The Board has held that while common ownership alone is not sufficient to establish single employer status, single employer will be found where common ownership translates into actual or active common control. Emsing's Supermarket, 284 NLRB 302 (1987). In addition, the Board examines the management structure of the subsidiary, whether the subsidiary has authority over its employment terms and conditions and whether the parent and subsidiary have separate operations. Wisconsin Education Association, 292 NLRB 68 (1989). Actual, rather than potential control by the parent is generally required. Local Union 391, IBT (Vulcan Materials Co.), 208 NLRB 540, 543 (1974). In contrast to Respondents' exceptions, the ALJ correctly fond Respondents to be a single employer. (RE 1) (RB 12-13)

1. There is Significant Evidence of Interrelation of Operation

In its Exceptions brief Respondents boldly claim that there is "no evidence" the Respondents operations are interrelated. (RB 12) Here, the record evidence shows considerable interrelatedness of business operations. Respondent Avanti was the primary company throughout the entire bankruptcy proceedings. Respondent Avanti negotiated the MOU, setting forth the terms under which it would purchase Community Hospital from Karykeion. Respondent Avanti gave Karykeion a $1 million bridge loan to keep it solvent during bankruptcy. Respondents posit that once Respondent Avanti's senior lender refused to back the purchase, two completely separate entities suddenly emerged to buy and operate Community Hospital, with no relationship whatsoever to Respondent Avanti. That is not the case and the

record supports a contrary conclusion. The record evidence shows that as early as February before being incorporated Respondent Management was in the picture and being interrelated with Respondent Avanti. The employment applications read that applicants were applying to work for Respondent Management. The flyers announcing the on-site interviews and week-long job fair, had Respondent Management's name as the employing entity. Ansel, Karykeion's interim CEO, testified that he received the flyer from Stewart, Respondent Avanti's general counsel. Moreover, the evidence shows that Respondent Avanti's agents headed up the interviewing and hiring of Community Hospital employees.

It was not until March 4, that Respondents Holdings and Management were incorporated. Nevertheless, the record establishes that once created, Respondent Holdings and Karykeion executed an asset purchase agreement with terms virtually identical to those that Respondent Avanti had negotiated in its MOU with Karykeion. Thus, the same purchase price, same liabilities, same requirement for a leasing agreement to manage the hospital.

Despite Respondent Avanti's assertion that its senior lender forbade it from taking part in the purchase, Respondent Avanti still rendered significant financial support to Respondents Holdings and Management. The $250,000 balance owed on the bridge loan Respondent Avanti gave Karykeion was applied to the amount for which Respondent Holdings purchased the hospital; thus, the balance of the bridge loan was canceled by Respondent Holdings. Respondent Avanti was the guarantor on $7 million in the form of a loan and a line of credit to Respondents Holdings and Management, which money was earmarked specifically for the purchase and operation of Community Hospital. Steward could not explain why, if Respondent Avanti had no financial or business interest in either Respondent Holdings or Management, it served as guarantor on $ 7 million. It is not credible that Respondent Avanti would have agreed to a $ 7

million financial commitment for a company in which it has absolutely no interest, financial or otherwise. In her declaration to the bankruptcy court submitted in support of Respondent Holdings financial viability, Stewart testified that Respondent Avanti and Respondent Holdings were affiliates.

In the exceptions brief Respondents claim that Avanti has a different business address than Respondents Holdings and Management. (RB 12) However, the operating agreements of Respondents Holdings and Management as well as the incorporation documents identify 111 Sepulveda Boulevard in Manhattan Beach as the business address and Stewart, Respondents' own attorney, testified that Respondent Avanti shares that very same business address.

Respondent Avanti even holds itself out to the public as the owner of Community Hospital. On the day of the purchase Respondent Avanti's website posted an article announcing that Avanti added Community Hospital to its system of hospitals. The website article further announced that Lonergan would manage Community Hospital as the CEO with assistance from Respondent Avanti. Finally, the article identifies Community Hospital as being owned and operated by Respondent Avanti. As the ALJ aptly found "Respondents provided no evidence to explain the apparent inconsistency between Avanti's purported tangential relationship simply as loan guarantor of [Respondent Holdings] and the degree of its ownership and control of [the hospital] as set forth in its website." (ALJD 3:34-36)

Thus, Respondent Holdings purchased Community Hospital, Respondent Management manages the hospital and the employees, while Respondent Avanti provided the financial backing to purchase and run the hospital. Therefore, the record reveals sufficient evidence that the business operations are interrelated.

2. *Respondents Have Control over Labor Relations and Common Management*

Respondents assert that the ALJ failed to examine the day-to-day control over the hospital's labor relations policies. (RB 13) This assertion mischaracterizes the ALJ's decision. Before the March purchase Lonergan and her management team worked at East L.A. Doctors, which is directly owned and managed by Respondent Avanti. Thus, the terms and conditions of work and other work place policies in place at East L.A. Doctors were established by and maintained by Respondent Avanti. Lonergan testified that she takes her work orders and instruction directly from Respondent Avanti's officers and she, in turns, directs her management team. Respondent Avanti's officers assigned Lonergan and her management team to carry out the interviewing and hiring of applicants for Community Hospital. The ALJ found that Respondent Avanti then assigned Lonergan and her management team to management Community Hospital and since they have been in charge of the daily operations of the hospital.

Once Respondents purchased Community Hospital, all of the terms and conditions of work Respondent Avanti had at East L.A. Doctors, were instituted at Community Hospital. Respondents instituted the same pay scale, work rules and regulations, sick and vacation leave policies, and the same employee insurance benefits, including the health and dental benefits. If employees perform work at both hospitals during the same pay period, they are still paid in a single pay check. CFO Lopez described this part of the pay system as akin to merely allocating the work hours to a different department. Respondent Avanti also interchangeable uses many of the same hospital department managers at East L.A. and Community Hospital to manage and supervise employees from Lonergan, Lopez, James, and Hernandez, to the heads of various departments (such as lab, radiology, and dietary) Accordingly, the ALJ properly held that

Respondents Avanti through its management staff exercise actual and day-to-day control over Community Hospital. (ALJD 4:15-26)

3. Respondents Have Common Owners

Each Respondent has essentially the same group of managers and member-owners. These owners signed official corporate documents, including operating agreements, incorporation documents, the asset purchase agreement, and the management agreement. The record discloses that Dixon simultaneously served as the CEO of Respondent Avanti and as the chairman of Respondent Management; while Benjamin served as the CFO of Respondent Avanti and the vice president of finance with Respondent Management.

In conclusion, Respondent Avanti successful carried out the interviewing and hiring of employees and then Respondent Avanti's owners created two companies with a single specific purpose: to own and operate Community Hospital. Respondent Holdings purchased the hospital while Respondent Management employs and manages the hospital's employees. Respondent Avanti provided the financial support and backing to ensure that Respondent Holdings could successful bid to purchase the hospital. Then Respondent Avanti provided additional financial support for Respondents Holdings and Management to operate the hospital. Any purported "lines" between the entities are neither clear nor distinct as Respondents' argue. (RB 13)

Based on all the foregoing, the record establishes sufficient evidence that Respondents have common officers and owners, common managers, have interrelated business operations, have shared control over the labor polices of the hospital, and have held themselves out to the

public as a single-integrated business enterprise. Accordingly, the record supports a finding that Respondents are a singe employer.[18]

B. Respondents are a Burns Successor

If a union represented the predecessor's employees who comprise a majority of the successor's work force, the union has a rebuttable presumption of majority status despite the change to a successor employer and the successor employer has an obligation to bargain with the union. Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987). The presumption of majority status attaches if there is "substantial continuity" between the predecessor's business and that of the new employer, and if the new employer has hired a "substantial and representative complement" of its work force, a majority of which consists of the predecessor's employees. Prime Service v. NLRB, 266 F.3d 1233 (D.C. Cir. 2001). The Board has the authority to order bargaining between a successor employer and a union when, after the successor's purchase of the company, the bargaining unit remains essentially unchanged and over 50 percent of the employees hired by the successor are members of the incumbent union (predecessor employees).

[18] If it is determined that Respondents are not a single employer, Respondents are joint employers. In determining whether a joint employer relationship exists the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment. basic principle of joint employer status was set forth in Laerco Transportation, 269 NLRB 324 (1984), where the Board stated: To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of work.

Respondent Avanti handled the interviewing and hiring of Community Hospital employees. Inasmuch as there is no separate management company used to manage East L.A. Doctors, Respondent Avanti directly manages and operates that hospital. Respondent Avanti maintained specific terms and conditions of work at East L.A. Doctors. After Respondents purchased Community Hospital, those same terms and conditions work that Respondent Avanti had in place at East L.A. Doctors, were instituted at Community Hospital. Thus, all the employee rules and polices, including all the polices setting for vacation and sick leave that Respondent Avanti had in place at East L.A. Doctors were instituted at Community Hospital. Respondents also implemented at Community Hospital the identical insurance, medical, and dental benefits that Respondent Avanti had at East L.A. Doctors. Respondents even copied the same pay scales and instituted it at Community Hospital.

Furthermore, many of the same managers, supervisors, and department heads Respondent Avanti employs at East L.A. Doctors, are used at Community Hospital to manage and supervise employees. These managers and supervisors are directly responsible for the hiring, firing, discipline and direction of employees' daily work.

Accordingly, if Respondents are determined not to be a single employer, the record demonstrates sufficient evidence that Respondents are joint employers.

N.L.R.B. v. Burns Security Services, 406 U.S. 272, 280-81 (1972). As a Burns successor the employer is free to set its initial terms and conditions of work.

1. There Is Substantial Continuity of the Business Enterprise

There is substantial continuity of business enterprise and Respondents have not disputed that the business enterprise has not continued in substantially unchanged form.[19]

2. There Is Continuity of Work Force

To determine if there is continuity of workforce, the Board examines (1) whether there is majority status, (2) at the time when the new employer has hired a substantial and representative complement of employees; (3) in an appropriate bargaining unit. The Board does not require that a bargaining unit be the most appropriate unit, or the only appropriate unit. The unit in question need only be an appropriate unit. American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991).

a. Majority Status is Established in Every RN List Respondents Produced

Determining major status is the principal factor when determining a Burns successor issue. The inquiry is whether a majority of the new group of employees is composed of

[19] Nevertheless, the factors examined are whether there is continuity of the same business offering the same services, at the same facility, with the same jobs under the same supervisors, and using the same machines and equipment. Here, Respondents are still operation Community Hospital in the same building as an acute care hospital. Respondents purchased Community Hospital and began operating it with no hiatus or break in operation. RNs (and other employees) are still employed the same positions, performing the same job duties using the same machines and equipment. The same departments exist wherein RNs perform RN work. Thus, comparative review of Respondents' payroll document and Karykeion's payroll document, shows that RNs still work in: emergency room/UMS; intensive care unit; medical/surgical; pediatrics; surgery; and telemetry. No major operational changes were made. Respondents patched some holes and cleaned the hospital. In fact, Lopez testified that the only changes made were installing new time clocks and changing the housekeeping and food service vendors. Regarding machines and equipment, Respondents only added new time clocks and bought a few diffibulators. Accordingly, there is sufficient evidence of continuity of business.

previously represented employees. A successor employer does not have to hire a majority of the predecessor's employees. Rather a successorship requires only that a majority of the successor's employees are former employees of the predecessor. That is, whether the majority of non-supervisory RNs hired by Respondents were RNs employed by predecessor.

A representative majority is established in each list that Respondents produced. Thus, the record evidence supports that there were 47 non-supervisory RNs listed on Respondents' March 26-April 4 payroll abstract and 30 were employed with the predecessor in the CNA bargaining unit, which was a representative majority of 63.8%. Accordingly, a majority of Respondents' RNs were previously employed by the predecessor and members of the CNA bargaining unit.

Respondents' assert that it hired 65 RNs as of March 26. Of the 65 RNs, 36 were members of the CNA bargaining unit under the predecessor, which was a representative majority of 55.3%.

The ALJ found that Respondents admitted that a substantial and representative complement was reached during the first payroll period–April 5 to April 18. (ALJD 6:47-51) The record supports the ALJ's finding that as of the first full payroll period, the Union still maintained a representative majority. Thus, on Respondents' April 5 to April 18 payroll abstract there were 54 non-supervisory RNs and 33 of them were employed with the predecessor in the CNA bargaining unit, which was a representative majority 61.1.[20]

b. Substantial and Representative Complement

The bargaining obligation attaches when the successor employer hires a substantial and representative complement and a majority of that work complement were employed with the

[20] The ALJ correctly stated that there are 59 names on this payroll list, which is a representative majority of 55.9%. (ALJD 10:23-25) However, as stated above in footnote 12, five of those named are supervisors.

predecessor. Fall River, 482 U.S. 27, 107 S.Ct. 2225 (1987). Under Fall River, the Board must scrutinize the following factors to determine if the new employer has hired a substantial and representative complement: (1) whether the job classifications designated for the operation were filled or substantially filled; (2) whether the operation was in normal or substantially normal production; (3) the size of the complement on the date of normal production; (4) time expected to elapse before a substantially larger complement would be at work; and (5) relative certainty of the new employer's expected expansion.

i. The ALJ Properly Found that Respondents Hired a Substantial and Representative Complement

Under Fall River, the bargaining obligation is triggered when the new employer hires a substantial and representative complement, a majority of who are the predecessor's employees. However, it is not necessary to analyze the substantial and representative complement when there is an immediate hiring of the workforce without any interruption to the business. Eye Weather, 325 NLRB 973 (1998). Here, Respondents took over ownership and operation of the hospital without any hiatus or interruption in business.

Respondents admitted that Community Hospital was fully staffed as of March 26. During the investigation of the ULP charges Lopez testified in a sworn affidavit, given in the presence of counsel, that as of March 26 the hospital was fully staffed and Respondents had adequate staffing to successfully operate Community Hospital. It is well-settled Board law that affidavit testimony is admissible as substantive evidence. Bay Refrigeration Corp., 322 NLRB 1045, 1053 (1997). Lopez repeated that same testimony in the declaration submitted to the federal district court in the Section 10(j) proceeding. Lopez then repeated the testimony again before the ALJ in this ULP hearing. At the hearing, Lopez changed his testimony and claimed

that the hospital was fully staffed as of March 26 *with the 65 RNs* that Respondents allegedly hired. Respondents may not now claim that March 26 was not the date upon which there was a substantial and representative complement.

Any argument, that Respondents did not have a "full" complement and that the workforce was not "stable" until well after March 26 was properly rejected. Neither "full" nor "stable" is the Board standard in determining the issue. In Fall River, the court made clear that the standard is not "full complement." Id. at 47-48. The standard is whether there is substantial and representative complement. There is no requirement that Respondents fill every position.

ii. The Record Shows That Job Classifications Were Filled or Substantially Filled

The record demonstrates that the job classifications were filled or substantially filled as of March 26 and were certainly filled as of the first full payroll period (April 5 to April 18). Lopez testified that as of March 26 there was an adequate staffing level to successfully operate the hospital. Respondents' spreadsheet (RX 2, Exhibit A) shows that employees had been hired for all departments within the hospital. Moreover, on April 2, DPH conducted an audit of the hospital and determined that the hospital had adequate staffing levels.

iii. The Operation Was In Normal Or Substantially Normal Production

The record supports that on immediately upon Respondents take over, Community Hospital was in normal or substantial normal operations. The hospital was being run as an acute care hospital with no interruption in hospital services. Respondents presented no credible evidence showing that the hospital was no in normal operations as of March 26.

A. The ALJ Appropriately Rejected Respondents' Claim of Uncertain, Instability, and Chaos

At the hearing, Respondents took the position that many factors existed at the time of purchase that lead to a chaotic and unstable atmosphere, presumably somehow impacting the hospital's normal operation. Unfortunately for Respondents, neither chaos nor instability are defenses to a Burns successor case. These arguments are smoke screens designed to confuse and misdirect the issue.

In its exceptions brief Respondents reference a written strike notice it received, which strike never happened and Respondents presented no evidence that it prepared for any strike or any evidence of how the alleged strike notice affected its ability to achieve normal hospital operations. In fact, none of Respondents witnesses could even say which union called the alleged strike.

Respondents' argue that several employees did not show up to work but not one of Respondents' witnesses could identify a single employee, let alone a single RN, who did not show up to work or who worked for only a day or shift and never returned. Respondents supplied no details of how many nurses failed to show up; how many other job classifications failed to show up; how many shifts were affected by employees not showing up for work; whether as a result Respondents had to modify or change any services provided. Simply the record is devoid of any specifics of how normal operations of the hospital was impacted.

Regarding the use of floaters or migrating employees, historically and well-before Respondents bought the hospital, the employees named as floaters worked at both Community Hospital and East L.A. Doctors. Accordingly, their continuation of the practice was not an

unusual circumstance that could have possible effected the normal operation of the hospital.[21] Respondents' claim that it used registry agencies is not supported by evidence of how many RNs were used and how the frankly normal use of registry nurses impacted its ability to operate normally.

Respondents only offered vague, unsupported assertions that the above alleged circumstances somehow impacted its ability to operate normally at the time of its take over. Accordingly, the ALJ properly rejected these claims.

iv. Size of Complement on Date of Normal Operation

Respondents contend that the date of upon which it hired a substantial and representative complement was the first full payroll period (April 5-April 18); presumably, this would also be the period of normal operation. The size of the work complement during this period was 54 non-supervisory RNs, which is not at all substantially different from the workforce on March 26 (47 RNs). In fact with 54 RNs on its payroll as of the first full payroll period that would mean that as of March 26, with 47 RNs on the payroll, Respondents had hired 87% of is RN workforce, certainly comprising a substantial and representative complement.

If Respondents' position that 65 RNs were employed as of March 26, that number is in excess of the number of RNs working as of April 5, when Respondents claim that it hired a substantial and representative majority. Accordingly, if Respondents' position is accepted,

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[21] While Respondent appear to have abandoned the argument in its exceptions, at the hearing Respondents argued that these floaters should be included in any RN unit found appropriate. According to Respondents, there were ten non-supervisory RN floaters from East L.A Doctors. (RX 7) (Tr. 608-613) There are 11 names on RX 7, however, Louella Garcia is a house supervisor for Respondents and was also a supervisor for predecessor Karykeion. (Tr. 666) Of the ten, non-supervisory RN floaters, eight of them were members of the CNA bargaining unit at the time that the hospital was purchased (GCX 2). These same floaters appear on the CNA membership list entered into the record as GCX 28. Jae Kim and Kyong Lee can be found on page 9 of Karykeion's payroll records; Chung Park, Eleanor Ang, Maria Angeles "Angie" Villegas, Ronan Patonona on page 8; and Bell Suarez and Edna Baldovin on page 6. (GCX 2) James admitted that the individual identified on RX 7 as "Angie" Villegas is "Maria Angeles" Villegas. (Tr. 667)

Respondents unquestionably hired a substantial and representative complement as of March 26 because more RNs were working on March 26 than on April 5.

v. Time Expected to Elapse Before Larger Complement and Certainty of Expansion

There is ample evidence to establish that substantial and representative complement existed as of March 26. Respondents, however, argue that the substantial and representative complement was not reached until the first full payroll period – April 5 to April 18. Only a week elapsed before the first full payroll period and there was no substantial increase to speak of. Regarding an expansion, Lonergan testified that Respondents had no specific plan to expand and only had a wait-and-see plan based on general patient census.

c. The RN Unit as Described in the CBA is Still an Appropriate Unit

i. Board's Healthcare Rule Mandates The Appropriateness of an All RN Unit

In 1989, after lengthy and exhaustive hearings on proposed rule-making in the health care industry, the Board passed/developed the Healthcare Rule for acute care hospitals.[22] Under the Healthcare Rule, at Section 103.30 of the Boards' Rules and Regulations, a unit of all RNs is one of the eight presumptively appropriate bargaining units in acute care hospitals. (ALJD 6, fn 5) Thus, the Board determined that the eight specified units "shall be appropriate units, and the only appropriate units."[23] Here, the CNA bargaining unit is a standard, wall-to-wall RN unit, which is

[22] See proposed rulemaking at 284 NLRB 1558 (1988).

[23] Sec. 103.30 Appropriate bargaining units in the health care industry.—(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be

presumptively appropriate. The very reason why the Board decided to specifically identify appropriate healthcare units was to avoid protracted litigation over which job classifications belong together in bargaining units. This is the sort of protracted litigation approach Respondents took during the ULP hearing.

Moreover, the Board's Healthcare Rule provides that the eight units are presumptively appropriate except in "extraordinary circumstances". The only examples of extraordinary circumstances the Board pointed out are: (1) when the unit is fewer than five employees; (2) when two or more of the presumptively relevant units are consolidated; or (3) when issues arise relating to the representation of residual units.[24] The Board also identified what is not considered extraordinary circumstances: (a) Diversity of the industry, such as the sizes of various institutions, the variety of services offered, including the range of outpatient services and differing staffing patterns; (b) Increased functional integration of and a higher degree of work contacts between employees as a result of the advent of the multi-competent worker, increased use of "team" care and cross-training of employees; (c) Impact of nationwide hospital "chains;" (d) Recent changes within traditional employee groupings and professions, e.g., increase in specialization of RNs; (e) Effects of various governmental and private cost containment measures; (f) Single institutions occupying more than one contiguous building. 284 NRLB 1515, 1574.

Respondents presented no evidence showing any Board-defined extraordinary circumstances that would rebut the presumption that a wall-to-wall RN is an appropriate unit. Since the unit is presumptively appropriate the burden of proof is on Respondents to show that

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appropriate: (1) All registered nurses; (2) All physicians; (3) All professionals except for registered nurses and physicians; (4) All technical employees; (5) All skilled maintenance employees; (6) All business office clerical employees; and (7) All guards.

[24] Residual units are groups of employees omitted from established bargaining units.

the all-RN unit is now not appropriate. The weak and vague circumstances cited by Respondents are not extraordinary to rebut the presumption of an appropriate unit.

ii. The ALJ Properly Rejected Respondents' Argument to Include Other Non-RN Classifications

Respondents except to the ALJ's determination to exclude particular job positions – none of which are RN positions in the first instance. (RB 17-18) (RE 3) Respondents' claim that the ALJ excluded "licensed RNs position" misrepresents the record evidence and the ALJ's holding. (RB 17) None of the job classifications that Respondents seek to include in an appropriate RN unit are filled by RNs and Respondents failed to demonstrate any evidence –let alone sufficient evidence–of extraordinary circumstances that would justify the inclusion of any of the job classifications. Since the wall-to-wall RN bargaining unit is a presumptively appropriate unit it is Respondents' burden of proof to show circumstances extraordinary enough to include the below classifications. Respondents failed to carry this burden.

Respondents' exception to the ALJ's finding is based entirely on the ALJ not attaching weight to a single answer by Miranda. (RB 18) In response to Respondents' hypothetical question, Miranda speculated that all licensed RNs would have been included in the CNA bargaining unit with Karykeion. Rather than relying on legal authority and factual evidence presented during the hearing, Respondents rely on a speculative answer to a hypothetical question. This is not adequate evidence.

Inexplicably, Respondent failed to call the very witnesses that would have offered direct knowledge of their job duties and responsibilities, their supervision and the extent of common supervision, types of equipment and machines used and the extent of common usage, common education and training required for the position, common work schedules, degree and type of

interaction with RNs, or frequency of interaction with RNs. These are the facts and evidence examined to determine whether to include a job classification within a bargaining unit – not speculation. In any event, the ALJ correctly excluded the below job classifications.

A. Azuela-PIRM

Respondents called James, the CNO, to testify about the PIRM's duties but he does not even supervise the PIRM employee. The PIRM employee, Azuela, is supervised by the COO Hernandez, who Respondents did not call to testify. James provided testimony on what duties he believes that the PIRM position entails which is gathering and analyzing data, consulting with a team, and with doctors and nurses to determine ways to improve hospital. That being the extent of James' testimony, Respondents did not carry its burden. Respondents presented no evidence that the PIRM job position is any different from when Karykeion operated the hospital and no evidence of extraordinary circumstances that would warrant the inclusion of the PIRM job title. Telling is that fact that predecessor Karykeion employed the same employee Azuela, in the same position and he was not in the CNA bargaining unit. Therefore, the ALJ held that there is no record evidence that Azuela's duties are not closely-related to direct patient care. (ALJD 8:42-44)

Next, despite Respondents contention, none of the record evidence identifies Azuela as a RN. Thus, the ALJ concluded that there was no documentary evidence that Azuela is a RN. Respondents did not even produce Azuela's RN license, which would have supported Respondents' position that he is indeed a RN. A RN license is the type of credential that is in any RN's personnel file, a document that would be under Respondents' control, and surely produced if it existed.

Yet confronted with the utter absence of documentary evidence to show that Azuela is a RN, Respondents still except to the ALJ's findings. (RB 19) Respondents' sole argument is that the ALJ's failure to find that James' testimony was documentary evidence. James' testimony is not documentary evidence. It's not even relevant inasmuch as James never even supervised Azuela.

Finally, Respondents did not even call Azuela to testify about the degree of contact, if any, he has with RNs. Azuela is the witness who would have supplied knowledge of community of interest with RNs including any frequent, regular contact with RNs.

Therefore, Respondents failed to demonstrate sufficient evidence that the CNA bargaining unit is no longer appropriate and has expanded to include the PIRM positions. Accordingly, contrary to Respondents' exceptions, the ALJ's conclusion to exclude the PIRM position is supported by the record evidence.

B. Zemer-RN Educator

Respondents except to the ALJ excluding Zemer but in support of its exception, Respondents cite no legal authority and only argue that the ALJ should have credited Miranda's speculative testimony in response to a hypothetical question. (RB 18) (RE 3) As with the PIRM job position, Karykeion had an RN educator. Respondents' RN educator is Zemer. Respondents produced no evidence that the job position is any different from when Karykeion operated the hospital and no evidence of extraordinary circumstances that would warrant the inclusion of the position in the CNA bargaining unit. Respondents presented no evidence that RN educator is a RN or has any community of interest with RNs.

Finally, as the ALJ held, there is no documentary record evidence that Respondents ever hired an RN educator and specifically no evidence that an employee named Zemer was hired. Respondents claim that Zemer was hired but her name is not on the payroll documents entered into the record by Respondents nor is her name on the payroll documents General Counsel entered into the record. Thus, it is likely that Zemer or an RN educator was not hired at all or was hired at sometime well outside of any relevant period of time. Therefore, the record evidence supports the ALJ's finding to exclude the RN educator.

C. Edmonds - Infection Control Employee

Again, Respondents except to the ALJ's findings but cite no legal authority and only argue that the ALJ should have credited Miranda's speculative testimony in response to a hypothetical question. (RB 18) All hospitals are required to have an infection control plan; thus, Karykeion had a plan and an infection control employee and that person was not a member of the CNA bargaining unit. Again, Respondents presented no evidence that this job position is any different from when Karykeion owned the hospital and no evidence of extraordinary circumstances that would warrant the inclusion of the position. Respondents admit that its infection control employee, Edmonds, is a contract employee who provides services for both East L.A. Doctors and Community Hospital, but no evidence was presented to show how frequently the employee works at Community Hospital versus East L.A. Doctors, when she works, when she was hired, or to what extent if any, she has frequent and regular interaction with RNs.

Finally, Edmonds, like Zemer, is not on any payroll documents presented at the hearing. Of course, Respondents did not present Edmonds to testify about her job duties or her interaction

with the RNs. Therefore, the record fully supports the ALJ's finding to exclude the infection control employee.

D. Vargas, Ponce, and Ramirez - Utility Review

Respondents except to the ALJ decision to not include utilization review managers in the CNA bargaining unit. (RB 18-19) Respondents claimed that two of is utilization review manages, Ponce and Vargas, are RNs. Juliet Miranda, Karykeion's director of nursing, testified about the duties of the utilization review managers, which are the same duties that they have under Respondents. In its exceptions brief, Respondents contend that James testified that Respondents effectively require its utilization managers to be RNs. Again, Respondents mischaracterizes the record evidence. James testified that Respondents "prefer" to use RNs for two of the utilization review manager positions, rather than LVNs. RN licensure is not required for the utilization review case manager position with Respondents and at no time did James testify to the contrary. In Salem Hospital, 333 NRLB 560 (2001), the petitioning union sought to include utilization review managers in a unit of all RNs. The Board held that since RN licensure was not a requirement for the utilization review manager position, they did not share a community of interest with RNs. Here, Respondents presented not an iota of evidence that its utilization review managers are required to have a RN license. Respondents could have produced the utilization review managers' job description but Respondents did not.

Moreover, Respondents presented neither of its utilization review managers to testify about their job duties and their interaction with the RNs. James made general comments about the utilization review managers assessing patient needs and talking to doctors. This type of nonspecific testimony does little to show any sufficient community of interest with RNs.

Nor did Respondents did not present either Ponce's or Vargas' RN license to show that they are in fact RNs and about any regular, frequent contact with RNs. Ponce and Vargas would have supplied direct evidence of their duties, responsibilities, and contact with RNs.

Next, Vargas' name does not exist on any payroll documents entered into the record by General Counsel or by Respondents. Thus, the ALJ correctly found that she was not on Respondents' payroll at the relevant period of time.[25]

Finally, regarding Erika Ramirez, the ALJ determined that James did not testify about Ramirez, her name was not even mentioned once during the 4-day hearing, and Respondents' payroll documents do not identify her as a RN. Still, Respondents except to the ALJ excluding Ramirez from the CNA bargaining unit. (RB 18) (RE 3) Under all these circumstances, Ramirez' exclusion was proper. (ALJD 8:18-22)

iii. The ALJ Properly Included RNs Ki Kim and Lillian Pascua

Respondents except to the ALJ's finding that RNs Kim and Pascua are included in the CNA bargaining unit. (RB 20) (RE 4) Respondents' argument is that 5 years ago Kim and Pascua were supposedly promoted to clinical supervisor. However, as of March 25, 2010 – the day before Respondents bought the hospital – both Kim and Pascua were identified as non-supervisory RNs and members of the CNA bargaining unit. (ALJD 9:37-39) Accordingly, the record supports the ALJ's findings.

[25] The ALJ mistakenly identifies Vargas as Marisela Gonzalez. (ALJD 8:12)

iv. The ALJ Correctly Included Per Diem RNs and Respondent's Veiled Effort to Exclude Them Should be Rejected

Respondents did not take exception to the ALJ's decision to include per diem RNs in the bargaining unit. (ALJD 6:25-45) Accordingly, Respondents have now waived the right to make that argument. Without formally excepting to this finding, an entire page of Respondents' exceptions brief is dedicated to stating why per diem should not be included. (RB 3)

Respondents actually argue that per diem RNs who were members of the CNA bargaining unit and who worked alongside other RNs with the predecessor should be excluded but the PIRM employee, the infection control employee, and utilization review managers should be included in the bargaining unit. Respondents' argument in this regard is illogical.

Respondents claim that per diem RNs should now be excluded because under Karykeion's system the per diem RNs worked under a less rigid system and there was no requirement that they commit to a certain number of work hours. In its brief Respondents assert that per diem employees worked sporadically. (RB 3) However, this claim is based entire on Respondents' witnesses, none of whom worked for Karykeion, who speculated that under Karykeion's per diem system employees worked sporadically. First, per diem RNs were included into the unit under the predecessor. As Miranda, Karykeion's director of nursing, and Williams testified, per diem RNs were included in the unit despite the number of hours they worked or what shifts they worked on. Second, the per diem agreements clearly state that per diem RNs had to be available to work one day a weekend, one weekend a month, had to submit their days of availability prior to each work schedule being posted, and had to agree to work specific holidays. Williams testified that per diems were subject to discipline for failing to fulfill

their work hours. Thus, contrary to Respondents' argument, the contractual per diem system under Karykeion had considerable structure.[26]

Again, rather than citing legal authority on the exclusion of per diems to support its position, Respondents attempt to rely on Ansel's opinion of who he considered to be an employee. In its exceptions brief, Respondents cite Ansel's testimony that he personally did not consider per diems to be employees. (RB 3) Of course Respondents left out the part of Ansel's testimony where he acknowledged that per diems were in fact in the bargaining unit with Karykeion. At any rate, Ansel's opinion on who he personally considered to be an employee is not relevant to any determination that needs to be made, and especially not relevant to a Burns analysis.

C. The ALJ Correctly Found that Respondents' Refusal to Recognize and Bargain is Unlawful

By letter dated March 6, 2010, the Union requested that Respondents recognize and bargain with it as the employees' bargaining agent. By letter dated March 27, Respondents refused. Since as March 26, and certainly as of the first payroll period in April, Respondent had hired a substantial and representative complement, a majority of who were employed by Karykeion and the unit was still appropriate, Respondents were obligated to recognize and bargain with the Union. Respondents are a successor they are obligated to recognize and bargain with the Union, Respondents' refusal violates the Act.

The Union made its request before Respondents hired a substantial and representative complement. Though the Union's premature demand for recognition and bargain does not

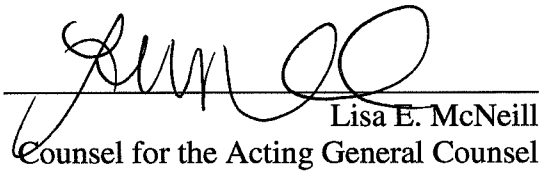
[26] Interestingly, Respondent did not produce a shred of documentary evidence showing the alleged criteria of Respondents' per diem RN policy. Thus, it would be difficult to ascertain if there was any difference between Karykeion's system and Respondents' system.

render it ineffective as a premature demand continues and remain effective until the employer hires the appropriate complement.

V. CONCLUSION

Respondents' exceptions should be rejected in their entirety and the ALJ's recommended Order should be adopted, modified by the Acting General Counsel's limited exceptions.

Respectfully submitted



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Dated at Los Angeles, California this 9th day of September, 2011.

STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief was submitted by E-filing to the Washington, D.C. on September 9, 2011.

The following parties were served with a copy of that document by electronic mail on September 9, 2011.

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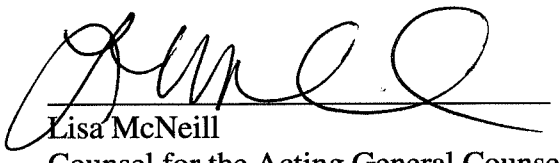

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